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No. 85-1806

IN THE

Supreme Court of the United States

October Term, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF DELAWARE, FLORIDA, IOWA, LOUISIANA, MARYLAND, NEW JERSEY, OKLAHOMA

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INTEREST OF AMICI CURIAE

Amici curiae are states which collectively are responsible for litigating and paying the judgments and attorneys' fees in many thousands of federal suits where

pendent state claims have been filed against their employees. These claims cover the vast range of state activities including law enforcement, corrections, licensing, and employment.

The ruling below (i) increases costs to the states, (ii) discourages pretrial settlements of civil rights cases having pendent state claims, and (iii) removes from consideration as a matter of law the possibility that juries may become confused by jury instructions covering widely divergent legal theories of liability and damages.

As institutional litigants, amici believe that not only has their sovereignty been seriously undermined and their treasuries' solvency been made even more precarious, but also our system of justice has sustained serious harm in that federal district courts are now forced to hear state law claims irrespective of practical reasons suggesting that a state forum is preferable.

CONSTITUTIONAL PROVISIONS

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States respectively, or to the people.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Decision Rejects Longstanding Comity Concerns By Imposing Greater Damages On A State For State Law Claims Tried In Federal Court Than If The Same Claims Were Tried In The State's Own Forum

The Eleventh Amendment recognizes "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring) Yet unless reversed by this Court, the lower court's decision permits plaintiffs to recover more from a state on state law claims against state employees in federal court than the plaintiffs would receive had they filed the identical claims in state court.

Virtually every state has legislative or judicially imposed limitations on damage awards for claims arising out of its employees' alleged tortious acts or omissions. (See Addendum) For example, Indiana prohibits a judgment for punitive damages and limits a judgment for damages to $300,000 for any single person and to $5,000,000 for all persons arising out of any single occurrence. Ind. Code. 34-4-16.5-4. However, the Indiana tort claims act expressly applies these limitations to public employees acting within the scope of their employment. Ind. Code 34-4-16.6-3(c). That is, under Indiana's tort claims act, the State is the real party in interest in a claim against a state employee. *Dept. of Commerce v. Glick*, 175 Ind. App. 449, 455, 372 N.E.2d 479, 483-84 (1978).

The Seventh Circuit's holding that the state employee individually rather than the state is the real party in interest on a pendent state claim not only strips the state of its Eleventh Amendment immunity in federal court, it also effectively eliminates state law limitations on damage awards.

Although the federal court may rely on the legal fiction

that the suit is against the individual employee, the state cannot. No one will work for a state if by doing so he or she is subjected to personal financial risk by limitless money damages suits. This is particularly true of persons in the sensitive areas of law enforcement and corrections who are the subject of frequent lawsuits. The state necessarily must step in to defend and pay any judgment against their employees who are acting within the scope of their employment as defined by state law regardless of whatever legal fiction may be used in determining the real party in interest question in federal court.

The Seventh Circuit held that a state could not properly argue that its agreement to indemnify its employees is of legal significance in determining whether the Eleventh Amendment applies. *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985)

But that analysis misperceives the issue. The issue before this Court on the certiorari petition is whether the real party in interest question in the context of a pendent state law claim against state employees is governed by federal law where there is no dispute that state law controls the real party in interest question in state court. Significantly, the Seventh Circuit's holding is in direct conflict with this Court's decision in *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459 (1945) that state law should be used to determine the applicability of the Eleventh Amendment where state concerns are at issue.

The Seventh Circuit's holding wholly ignores the doctrine of comity. Rather than permitting each state to act on state law matters in accord with its own law the Seventh Circuit decision undermines state sovereignty. By incorrectly determining the real party in interest issue, the Court of Appeals also effectively abolishes the limitations on judgments for money damages established by the legislature or judiciary in virtually every state. It is one thing for a federal court to erode a state's sovereignty in the context of a federal claim; it is something completely

different, however, to hold that a federal court may destroy state sovereignty in the context of a pendent state claim.

Indeed, the lower court's holding is no less than a frontal assault upon the Tenth Amendment to the United States Constitution which reserves powers not delegated to the United States to each of the sovereign states. More than a century ago, this Court affirmed the concept of federalism under our dual sovereignty system of constitutional government:

> [T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.... [I]n many articles of the Constitution the necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized.

Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869). More recently, this Court has emphasized that no branch of the federal government may "usurp traditional state functions." *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 687 (1982).

This Court should grant certiorari in order to examine whether the state's laws should be needlessly usurped by the federal courts on the basis of a legally incorrect decision that federal law applies in determining whether the state is the real party in interest in the context of a state law claim against a state employee. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (state law governs pendent state claim).

The need for this Court to resolve whether the federal courts may sweep away damage limitations set by state legislators and state courts is particulary critical at this time. Federal aid to the states is falling dramatically and the cost of liability insurance to governmental entites is skyrocketing. Some governmental liability insurance has simply disappeared from the market. See, e.g., *Cities*

Besieged, 71 A.B.A.J. 19 (Dec. 1985). This is the worst possible time for federal courts to needlessly and unconstitutionally expand the states' damage liability.

II. The Requirement That State Law Claims Be Tried Together With Federal Claims Will Discourage Settlement Of Cases Before Trial

The Seventh Circuit's ruling purportedly seeks to promote judicial economy by requiring that federal and state claims be tried together in the federal forum provided the claims are based on overlapping factual issues. (780 F.2d at 656) Unfortunately, the actual result of the decision will be to waste scarce judicial resources by discouraging pretrial settlement. Permitting federal civil rights claims and state claims to be routinely tried together discourages state defendants from settling before trial in the hope that the jury or judge will find defendants not liable on the civil rights claims and thereby not liable for any attorneys' fees. *Buero v. Trierweiler*, 616 F.Supp. 1414, 1417 (E.D. Mich. 1985) citing *Smith v. Robinson*, 468 U.S. ____, ____ n. 12, 104 S.Ct. 3457, 3468 n. 12 (1984).

The hope of a no-liability finding on the civil rights claim and thus not having to pay attorneys' fees is particularly realistic given this Court's recent decision in *Daniels v. Williams*, 474 U.S. ____, 106 S.Ct. 662 (1986) which holds that proof of negligence is insufficient to support a finding of liability in a due process case. It thus pays institutional defendants, such as amici, to avoid settlement before trial in that fees under 42 U.S.C. §1988 are almost always assessed when the plaintiff obtains some relief in a pretrial settlement involving some fee claims and some non-fee claims. *Maher v. Gagne*, 448 U.S. 122, 132-33 (1980).

Consequently, amici ask this Court to grant certiorari in this case to examine whether it is in the best interest of the federal judicial system for the federal courts to create procedures which needlessly discourage pretrial settlement of a class of cases which represent a significant share of the entire federal civil caseload.

III. A Rule That Potential Jury Confusion In Assessing Divergent Legal Theories Is Simply Not A Problem Is Contrary To This Court's Express Holdings; It Is Also Contrary To Human Experience.

The lower court's unsupported conclusion that potential jury confusion arising from differing standards of liability and damages has never been thought a source of serious confusion (780 F.2d at 656) is utterly at odds with this Court's landmark decision on the factors governing a district court's decision to retain or dismiss pendent state claims. In *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-28 (1966) this Court expressly held that the district court judge should consider the possibility of jury confusion in treating divergent legal theories of liability and relief in deciding whether to retain or dismiss the pendent state claims. Similarly, in *Moor v. County of Alameda*, 411 U.S. 693, 716 (1973) this Court affirmed the trial court's dismissal of pendent state claims where the jury trial "could become unduly complicated."

Moreoever, the Seventh Circuit's holding that potential jury confusion is simply not a problem as a matter of law cannot be supported by actual experience, particularly in a large multi-party, multi-claim case. An experienced district court judge should be permitted to assess whether the jury potentially could be confused by, for example, instructions calling for use of a comparative fault analysis with respect to the state claims but not with respect to the federal claims. Similarly, where negligence claims are tried together with due process or Eighth Amendment claims, a jury may easily be confused by one instruction that states negligence is not enough for a finding of liability on the civil rights claim yet another instruction a short time later that states negligence is sufficient for a finding of liability on the pendent claim.

Rather than an immutable legal rule holding that jury confusion is simply not a problem, the determination of

whether a likelihood of jury confusion exists calls for the informed exercise of a district court's discretion on a case-by-case basis.

This Court should grant certiorari in order to clarify whether the district court may properly rely on practical reasons in declining to try pendent state claims.

CONCLUSION

This case raises important and recurring Eleventh Amendment and Article III pendent jurisdiction issues.

The Court of Appeals' decision conflicts with at least three decisions of this Court, namely, *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and *Moor v. County of Alameda*, 411 U.S. 693 (1973).

The Seventh Circuit's decision not only strips states of their Eleventh Amendment immunity, it also ignores federalism and comity concerns embodied in the Tenth Amendment by usurping virtually every state's legislative or judicial decisions which have set limits on damage judgments for state-law tort suits against state employees. This decision, which seriously undermines our dual sovereignty system of government, comes at a time of dramatic declines in federal aid and a crisis in the cost and availability of liability insurance.

The Court of Appeals' decision not only harms amici states, it also harms all other litigants as well as the federal judicial system itself by discouraging pretrial settlement of civil rights cases with pendent state claims in the hope of avoiding payment of attorneys' fees.

Finally, this Court should examine whether it is in the best interest of the federal judicial system to force federal district courts to try federal and state claims together in every case where common factual issues exist regardless of potential jury confusion or other practical reasons favoring a state forum.

Certiorari should be granted and the case set down for briefing and argument. Alternatively, certiorari should be granted and the Seventh Circuit decision should be summarily reversed on the authority of the three cases cited in this conclusion.

Respectfully submitted,

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ADDENDUM

Selected Statutes and Decisions

The following statutes limit the award of actual and/or punitive damages against a State or its employees acting within the scope of their employment as defined by state law.

Alaska Stat. §09.50.280 (1965) (no punitive damages)

Ariz. Rev. Stat. Ann. §12-820.04 (Supp. 1985) (no punitive damages)

Ark. Const. Art. 5, §20 (sovereign immunity provision)

Cal. Govt. Code §818 (1980) (no punitive damages)

Colo. Rev. Stat. §24-10-114 (1982) (no punitive damages; limit on actual damages)

Del. Const. Art. I, §9 (sovereign immunity provision)

Fla. Stat. §768.28 (Supp. 1986) (no punitive damages; limit on actual damages)

Ga. Const. Art. I, Sec. II (sovereign immunity provision)

Haw. Rev. Stat. §662-2 (1976) (no punitive damages)

Idaho Code §6-918 and §6-926 (1948 and Supp. 1985) (no punitive damages; limit on actual damages)

Ill. Rev. Stat. ch. 37, par. 439.8 (1985) (limit on actual damages)

Ind. Code §34-4-16.5-4 (1981) (no punitive damages; limit on actual damages)

Iowa Code §25A.4 (Supp. 1985) (no punitive damages)

Kan. Stat. §75-6105 (1984) (no punitive damages; limit on actual damages)

Ky. Rev. Stat. §44.070 (1980) (limit on actual damages)

La. Rev. Stat. §13:5106 (Supp. 1986) (limit on actual damages)

Me. Rev. Stat. tit. 14, §8105 (1980) (no punitive damages; limit on actual damages)

Md. State Gov't Code Ann. 12-104 (1985) (no punitive damages)

Mass. Ann. Laws G.L. ch. 258, §2 (1980) (no punitive damages; limit on actual damages)

Minn. Stat. §3.736 (Supp. 1985) (no punitive damages; limit on actual damages)

Miss. Code. Ann. §11-46-15 (Supp. 1985) (no punitive damages; limit on actual damages)

Mo. Rev. Stat. §537.610 (Supp. 1985) (no punitive damages; limit on actual damages)

Mont. Code Ann. §§2-9-105, 2-9-107 (1985) (no punitive damages; limit on actual damages)

Nev. Rev. Stat. §41.035 (1985) (no punitive damages; limit on actual damages)

N.H. Rev. Stat. Ann. §541-B:14 (Supp. 1985) (no punitive damages; limit on actual damages)

N.J. Rev. Stat. §59:9-2 (1982) (no punitive damages)

N.M. Stat. Ann. §41-4-19 (1982) (no punitive damages; limit on actual damages)

N.C. Gen. Stat. §143-291 (1983) (limit on actual damages)

N.D. Cent. Code §32-12.1-03 (Supp. 1985) (limit on actual damages)

Okla. Stat. tit. 51, §154 (Supp. 1978) (no punitive damages; limit on actual damages)

Or. Rev. Stat. §30.270 (1983) (no punitive damages; limit on actual damages)

Pa. Stat. Ann. tit. 42, §8528 (1982) (limit on actual damages)

R.I. Gen. Laws. §9-31-2 (1985) (limit on actual damages)

S.D. Comp. Laws. Ann. §21-32-16 (Supp. 1985) (limit on actual damages)

Tex. Rev. Civ. Stat. Ann. art. 6252-19 (Supp. 1985) (no punitive damages; limit on actual damages)

Utah Code Ann. §§63-30-22, 63-30-34 (1978 and Supp. 1985) (no punitive damages; limit on actual damages)

Vt. Stat. Ann. tit. 12, §5601 (1973) (limit on actual damages)

Va. Code §8.01-195.3 (1984) (no punitive damages; limit on actual damages)

Wis. Stat. Ann. §893.82 (Supp. 1985) (no punitive damages; limit on actual damages)

Wyo. Stat. §1-39-118 (Supp. 1985) (no punitive damages; limit on actual damages)

The following judicial decisions either bar punitive damages in any case or bar punitive damages or any damages from being assessed against a governmental entity or public employees acting within the scope of their employment as defined by state law.

State v. Inman, 239 Ala. 348, 195 So. 448 (1940)

Smith v. District of Columbia, 336 A.2d 831 (D.C. App. 1975)

City of Chicago v. Langlass, 52 Ill. 256 (1869)

Breaux v. Simon, 235 La. 453, 104 So.2d 168 (1958)

Ray v. City of Detroit, 67 Mich. App. 702, 242 N.W.2d 494 (1976)

Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960)

Buck v. Hooker Chemicals & Plastics Corp., 117 Misc. 2d 496, 458 N.Y.S. 2d 134 (1982)

Drain v. Kosydar, 54 Ohio St. 2d 49, 374 N.E.2d 1253 (1978)

Feingold v. Southeastern Pa. Transportation Authority, 339 Pa.Super 15, 488 A.2d 284 (1985)

Belue v. City of Spartanburg, 276 S.C. 381, 280 S.E.2d 49 (1981)

Austin v. City of Memphis, 684 S.W.2d 624 (Tenn. Ct. App. 1984)

Willett v. Village of St. Albans, 69 Vt. 330, 38 A. 72 (1897)

Skidmore v. Seattle, 138 Wash. 340, 244 P. 545 (1926)

Wilson v. City of Wheeling, 19 W. Va. 323 (1882)